In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1370

JAMES DOYLE CAVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, with co-defendants Sirkin and Amsterdam, was convicted by a jury in the United States District Court for the Southern District of Iowa of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314 (Count II), and of conspiracy to commit that offense (Count I). Petitioner was sentenced to imprisonment for a period of two years on each count, to run concurrently, and fined $3,000 on the conspiracy count. The court of

appeals unanimously affirmed the conviction on March 1, 1968 (Pet. App. A, pp. 5-29), and denied a petition for rehearing on March 22, 1968. The petition for a writ of certiorari, filed on April 27, 1968, is out of time under Rule 22-2 of the Rules of this Court.

There is, in any event, no reason for further review by this Court of petitioner's contention that the "retail value" of the goods transported in interstate commerce was not the proper standard for determining the jurisdictional amount required by the statute (Pet. 2-4). The evidence at trial, summarized in detail by the court of appeals (Pet. App. A, pp. 7-20), showed that in August 1965, petitioner's two co-defendants bought and started to operate a retail drug business (Super Drug Store) in Des Moines, Iowa. They paid the owner in two $2,000 checks drawn on the drug corporation account, respectively post-dated two and four weeks after the sale (Tr. 15-32, 36-37, 43, 62-63, 89, 96, 104-108, 115-118, 129-130, 137-139, 148). When deposited by the seller, the checks were returned marked "payment stopped" (Tr. 38-39).

In the meantime, the co-defendants began telephoning various merchandising establishments, representing that Super Drug was commencing a promotion program and needed certain merchandise (such as color television sets, air conditioners and vacuum cleaners) for promotional prizes. These calls resulted in the purchase from some eight different merchants of the following items having the negotiated price and retail price as indicated:

Supplier	Sale Price Agreed Upon	Retail Price	Item
Central TV	$ 892.50	$ 975.00	TV combination
Ingersoll TV	663.00	750.00	TV combination
G. Nicholson	714.00	800.00	TV combination
Philco	189.64	229.95	Air conditioner
Gifford & Brown	201.96	279.95	Air conditioner
Mitcham TV	975.00	975.00	TV combination
Midwest Vacuum	294.00	359.70	6 vacuum cleaners
Younkers	647.50	765.00	TV combination
TOTALS	$4577.60	$5134.60	

With the exception of the Philco air conditioner which was mistakenly delivered to Super Drug on a credit rather than cash basis (Tr. 230-235, 240-242), all of the items were delivered to Super Drug and paid for by checks drawn on the business account, signed by co-defendant Sirkin in his alias, Harry Karl. All of the checks were returned marked "Account Closed" when presented for payment (Tr. 108, 110, 118-119, 162-166, 174-178, 186-190, 200-206, 216-220, 273-276, 280-281, 245-248, 264-268). In addition, a $175 air conditioner was ordered by Sirkin but never delivered because the wrong address was recorded on the delivery ticket (Tr. 152-155). An attempt to buy another television combination in a price range of $800 to $1200 failed when the seller made a telephone credit inquiry concerning Super Drug before completing the transaction (Tr. 257-263). All the merchandise in the store, including the television sets and air conditioners referred to above, was removed from the store with petitioner's assistance on September 1 and 2, 1965, and was shipped in interstate commerce (see Pet. App. 15-19).

Petitioner argues that the negotiated actual sale price of merchandise for the supposed business promotion, rather than the normal retail price, must be used to calculate the statutory jurisdictional amount of $5,000. As the court of appeals held, however (Pet. App. 23-25), the conspiracy count is amply sustained in jurisdictional amount by the $4,497.44 (petitioner's figures) actually "paid" for merchandise delivered plus a minimum of $975 worth of merchandise which the conspirators attempted to obtain but did not receive because of misdelivery and an adverse credit report. Since the offense of conspiracy is complete when the unlawful agreement has been made and there has been an overt act in furtherance thereof, the value of all property fraudulently sought in the course of the conspiracy, whether or not it was actually obtained or transported in interstate commerce, is relevant in determining the jurisdictional amount for purposes of the conspiracy count. *Carlson* v. *United States*, 187 F.2d 366, 369 (C.A. 10), certiorari denied, 341 U.S. 940. *United States* v. *Wilson*, 284 F.2d 407 (C.A. 4), cited by petitioner, is not to the contrary. *Wilson* was a non-conspiracy case holding that, where severity of the penalty is determined by the value of the stolen goods involved, the imposition of the more severe sentence must be supported by *at least some evidence* of the value of the goods apart from their physical appearance.

In any event, the trial court was correct when it charged that the "retail market value" would be the "market value".[1] See *United States* v. *Willis*, 322 F.

[1] 18 U.S.C. 2311, insofar as relevant to this case, defines "value" as the "face, par, or market value, whichever is the

2d 548, 550 (C.A. 3); *Herman* v. *United States*, 289 F.2d 362, 366-367 (C.A. 5), certiorari denied, 368 U.S. 897; *Kowalchuk* v. *United States*, 176 F.2d 873, 876 (C.A. 6); *Gordon* v. *United States*, 164 F.2d 855, 858-859 (C.A. 6), certiorari denied, 333 U.S. 862; *Husten* v. *United States*, 95 F.2d 168, 171 (C.A. 8). Petitioner's insistence that the "actual sales price" is conclusive (Pet. 2-3) ignores the fact that goods are often transferred at prices below their normal market value under special circumstances, such as sales to churches, schools, employees of the seller, or to other businesses for business purposes (Tr. 158, 215, 219, 270). The sales prices agreed on in the instant case were based on cash arrangements and the alleged promotion purpose for which the goods were bought.

United States v. *Tippett*, 353 F.2d 335 (C.A. 4), certiorari denied, 383 U.S. 908, and *United States* v. *Willis*, 322 F.2d 548 (C.A. 3), cited by petitioner (Pet. 4), are not in conflict. In *Tippett*, which involved a large quantity of a single type of merchandise (tires) stolen from a jobber who normally sold at wholesale prices, the court held that the statutory "market price" in such circumstances is the wholesale price. In *Willis* the conviction was reversed because the only witness who testified concerning the retail price was not qualified to do so, and the record was therefore devoid of any evidence that the retail value was $5,000 or more.

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greatest". The testimony was directed at ascertaining the local regular retail price for the items at the relevant time rather than the manufacturer's "suggested retail price" as implied by petitioner (Pet. 3) (see Tr. 164-165, 189, 196, 198, 205, 220, 236-237, 243, 249, 251-252, 265, 271-272, 275).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1968.

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